PP

v.

MARUTHAMUTHU SRETHARAN

HIGH COURT MALAYA, ALOR STAR
MOHD SOFIAN ABD RAZAK JC
[PJK NO: 45-07-2004]
2 JANUARY 2007

CRIMINAL PROCEDURE: *Sentence - Possession of cannabis - Plea of guilty - Facts and circumstances - Ownership of drugs - Whether doubt existed - Whether there were aggravating factors - Extenuating circumstances - Consideration of - Appropriate sentence - Dangerous Drugs Act 1952, ss. 6, 39A(2)*

The accused herein pleaded guilty to the amended charge of possession of drugs under s. 6 of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39A(2) of the Act. The court sentenced the accused to seven years imprisonment from the date of his arrest and further ordered that the accused be given 10 strokes of the rattan. The prosecution was dissatisfied with the sentence imposed and filed a notice of appeal against the inadequacy of sentence. It was the deputy public prosecutor's submission that the charge against the accused was a serious offence and urged the court to impose severe sentence in the interest of the public.

Held:

(1) Although public interest and public safety is paramount when compared to the interest of an individual as in the instant case, this court did not agree that the maximum sentence be imposed against the accused on the facts and circumstances. By reading the facts of the case in exh. P4, the accused was asleep with a woman companion in a room when the police together with the other members of the raiding party opened the door to the said room. The police had found one transparent plastic wrapper but there was no indication whether the accused was the owner or the tenant of the house. Neither P4 nor the accused's plea of mitigation made any reference to the owner of the drugs and thus the lurking doubt existed as to the ownership of the drugs. (paras 22, 23)

(2) The court must strike a balance with regard to the proportion between the offence, the punishment provided by law, the mitigating and aggravating factors and any extenuating circumstances which might exist and to be in favour of the accused. In the instant case, there were no aggravating factors for the court to consider and the accused had no record of previous conviction. (para 24)

(3) As a result of the accused being arrested for the offence the family institution upon which the marriage was built crumbled. The wife of the accused deserted him without trace and the three children were placed in an orphanage home. The accused had expressed his remorsefulness and wishes to change his lifestyle and to look after his three children when he completes his prison term. All these factors are extenuating circumstances for the court to ponder when considering the appropriate sentence according to the law. (para 25)

(4) Taking into account the general principle and the aims and purposes of sentencing and also the mitigating plea by the counsel and submission by the deputy prosecutor, the appropriate sentence to be imposed on the accused is seven years imprisonment from the date of arrest and ten strokes of the rattan. (para 30)

[Order accordingly.]

Case(s) referred to:

Liow Siow Long v. PP [1970] 1 MLJ 40 ***(refd)***
Mohamad Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ 209 SC ***(refd)***
PP v. Jafa Daud [1981] 1 MLJ 315 ***(refd)***
PP v. Dato' Waad Mansor [2005] 1 CLJ 421 FC ***(refd)***
PP v. Idzhaam Shafie [2006] 6 CLJ 243 HC ***(refd)***
PP v. Mohd Nooh Yusof [1993] 4 CLJ 275 HC ***(refd)***
PP v. Mohd Tajudin Ismail [1998] 7 MLJ 542 HC ***(refd)***
PP v. Nazaruddin [1993] 2 CLJ 543 HC ***(refd)***
PP v. Shariffah Syed Hashim [2006] 6 CLJ 503 HC ***(refd)***
PP v. Sulaiman Ahmad [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447 HC ***(refd)***
R v. Kenneth John Ball [1951] 35 Cr App R 164 ***(refd)***
R v. Sargeant [1974] 60 Court of Appeal R 74 ***(refd)***
Rex v. Grondkowski [1946] All ER 560 ***(refd)***
San Sow Kim v. PP [1995] 2 MLJ 137 ***(refd)***
Tia Ah Leng v. PP [2004] 4 CLJ 77 CA ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 39A(2), 39B(1)(a), (2)

Other source(s) referred to:
The English Sentencing System, 3rd edn, p 141

For the appellant - Nurhafizza Azizan DPP
For the respondent - M Chandran; M/s Thiru Chandran & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Sofian Abd Razak JC:

[1] The accused was originally charged for trafficking of dangerous drugs to wit, 1037.9 grammes of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under s. 39B(2) of the Act which carries a mandatory death sentence by hanging upon conviction.

[2] On 22 May 2006 the learned deputy public prosecutor, tendered on behalf of the public prosecutor an amended charge of the public prosecutor, exh. P3 to one of possession under s. 6 and punishable under s. 39A(2) of the Act, which carries an imprisonment for life or for a term which shall not be less than five (5) years and shall also be punished with whipping of not less than ten (10) strokes of the rattan.

The amended charge:

> Bahawa kamu pada 8 Oktober 2002, pada jam lebih kurang 12.30 tengahari di rumah No. B95 Lorong Cendana 5, Taman Cendana, Sungai Petani di dalam daerah Kuala Muda, di dalam Negeri Kedah Darul Aman telah didapati memiliki dadah berbahaya iaitu cannabis seberat 1037.9 grams dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39A(2) Akta yang sama.

[3] The amended charge was read and explained to the accused who having understood the amended charge and the nature and consequences of pleading guilty to the amended charge nevertheless, pleaded guilty to the charge. The court then recorded the guilty plea of the accused.

[4] The accused also admitted the written facts relating to the commission of the offence marked as exh. P4 as being true and the other exhibits tendered by the prosecution; namely the Chemist Report bearing No: Makmal (PG) FOR 3374/02-0, twelve copies of photograph marked as exh. P6A-L, one unit of car key registration number WBH 4644 marked as exh. P7, one black plastic bag marked as exh. P8, one piece of golden foil marked as P9, one piece of transparent plastic wrapper marked as exh. P10, one small plastic containing plant material marked as exh. P11, one small plastic containing plant material marked as exh. P12, one (1) brown coloured box marked as exh. P13, one (1) plastic containing plant material marked as exh. P14. The motorcar could not be brought to court but the photograph of the motorcar bearing registration number WBH 4644 was tendered and marked as exh. P15. The defence did not object to the said tendering. The accused admitted to all the above marked exhibits as being true.

[5] The court found the accused guilty as per the amended charge and sentenced the accused to seven years imprisonment from the date of his arrest, that is 8 October 2002. The court further ordered that the accused be given 10 strokes of the rattan.

[6] The prosecution is dissatisfied with the sentence imposed and has filed a notice of appeal, against the inadequacy of sentence.

[7] Before passing sentence the court considered the accused's plea in mitigation made on his behalf by his learned counsel, En. M. Chandran and the submission of the learned deputy public prosecutor Cik Nurhafizza Azizan.

[8] The mitigation plea submitted on behalf of the accused is as follows:

1) The accused was 28 years old when arrested and worked as a construction worker earning about RM30 per day.

2) The accused was married in 1994 and had three (3) children aged 6, 7 and 10 years old respectively.

3) The accused at the time of his arrest was staying together with the wife and their three (3) children.

4) After the accused was arrested, the accused's wife had left the three (3) children and could not be traced and in January 2003, the accused's mother had passed away.

5) The accused's three (3) children were placed in an orphanage home in Sungai Petani, Kedah.

6) The accused had pleaded guilty and is a factor which the court ought to consider in assessing sentence as it saved the time of the court.

7) The accused had no previous conviction and urged the the court to give him a chance.

8) The drugs involved is cannabis which is 1037.9 grammes in weight and is not a 'hard' drug.

9) The accused is remorseful and wishes to change his life style and to look after his three (3) children when he completes his prison term.

10) Urged the court to order the sentence of imprisonment to commence from the date of his arrest on 8 October 2002.

[9] The following cases were relied on by learned counsel and it was submitted that the accused who has pleaded guilty should be treated leniently.

a) *PP v. Nazaruddin* [1993] 2 CLJ 543

b) *PP v. Mohd Nooh bin Yusof* [1993] 4 CLJ 275

c) *PP v. Jafa bin Daud* [1981] 1 MLJ 315

d) *Zaidon Shariff v. PP* [1996] 4 CLJ 441

e) *PP v. Mohd Tajudin Ismail* [1998] 7 MLJ 542

[10] On the other hand, the learned deputy public prosecutor submitted as follows:

1) The charge against the accused under s. 39A(2) DDA 1952 is a serious offence which is besetting the country and the court should not treat it lightly.

2) The weight of the cannabis of 1037.9 grammes found in the accused's bedroom and in the car.

3) The fact that the accused was 28 years old and working was not a reason for committing the offence.

4) Urged the court to impose severe sentence in the interest of the public.

[11] The learned deputy prosecutor submitted a list of authorities which contained the following cases:

1) *PP v. Mohd Tajudin bin Ismail* [1998] 7 MLJ 542

2) *Tia Ah Leng v. PP* [2004] 4 CLJ 77

3) *Zaidon Shariff v. PP* [1996] 4 CLJ.

[12] Having considered the amended charge, the facts of the case as presented by the prosecution against the accused, the exhibits which are relevant against the accused, the plea of guilty, the submissions of both learned counsel and the deputy public prosecutor, the accused was sentenced to seven years imprisonment from the date of his arrest on 8 October 2002 and 10 strokes of the rattan.

[13] In determining the appropriate sentence to be passed on the accused, the court is appraised of the general principle and the aims and purposes of sentencing.

[14] On the general principle of sentencing, the court is guided by the well known and oft quoted case of *R v. Kenneth John Ball* [1951] 35 Cr. App R 164 where Hilbery J had stated:

> In deciding the appropriate sentence a court should always be guided by certain consideration. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible.
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> Such a sentence may also deter the particular criminal from committing crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a

particular crime, but fixes a maximum sentence and leave it to the court to decide what is, within that maximum, the appropriate sentence for each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

[15] Lord Goddard LCJ in *Rex v. Grondkowski* [1946] All ER 560 had this to say:

The judge must consider the interest of justice as well as the interest of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interest of the prisoners.

[16] Thus it is clear from the above passages that the court takes into consideration the element of public interest as being the foremost in mind when sentencing.

[17] As regards the aims and purposes of sentencing, the Federal Court in the case of *PP v. Dato' Waad bin Mansor* [2005] 1 CLJ 421 quoted a passage by Lawton LJ in *R v. Sargeant* [1974] 60 Court of Appeal R 74 at p. 77, the (4) main aims of sentencing where His Lordship emphasised that "Those classical principled have are summed in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and apply the fact of the case to see which of them has the greater importance in the case with which he is dealing."

[18] In dealing with the principle of retribution Lawton LJ in *R v. Sargeant (supra)* emphasized that while the concept of an eye for an eye has no place in sentencing practice, an important aspect of retribution is that "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by he sentences they passed. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the courts is to lead public opinion."

[19] The court on this principles is conscious of the fact that drug problem has reached a critical level which needs to be addressed to reflect the laws which the legislature thought it fit to increase the punishment for offences under s. 39A(2) of the Act, as amended.

[20] The court is also mindful of the other aims and purposes of sentencing namely deterrence, prevention and rehabilitation as stated by Lawton LJ in *R v. Sargeant (supra)* and find it necessary to quote from his judgment *in extenso*.

> On deterrence, His Lordship said "There are two aspects of deterrence: deterrence of the offender and deterrence of likely offenders. Experience has shown over the years that deterrence the offenders is not a very useful approach, because those who have their wits about them usually find the closing of prison gates an experience which they do not want again. If they do not learn that lesson, there is likely to be a high degree of recidivism anyway. So far as deterrence of others is concerned, it is the experience of the courts that deterrent sentences are of little value in respect of offences which are committed on the spur of the moment, either in hot blood or in drink or both.
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> Deterrence sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well be put off by deterrent sentences.
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> On prevention, His Lordship said: "Unfortunately it is one of the facts of life that there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only protection which the public has is that such persons should be locked up for a long period.
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> On rehabilitation, His Lordship said: "Finally, there is the principle of rehabilitation. Some 20 to 25 years ago there was a view abroad, held by many people in executive authority, that short sentences were of little value, because there was not enough time to give in prison the benefit of training. That view is no longer held as firmly as it was. This young man does not want prison training. It is not going to do him any good. It is his memory of the clanging or prison gates which is likely to keep him from crime in the future.

[21] I am aware of my decision in *PP v. Idzhaam Shafie* [2006] 6 CLJ 243 wherein the accused was sentenced to 10 years imprisonment from the date of the arrest and 10 strokes of the rattan for possession of 204 grammes of cannabis under s. 6 Dangerous Drugs Act 1952 punishable under s. 39A(2) of the same Act.

[22] Although this court agrees with the learned deputy public prosecutor's submission that public interest and public safety is paramount when compared to the interest of an individual as in the instant case, the accused who had pleaded guilty to the amended charge of possession, this court does not agree that the maximum sentence be imposed against the accused on the facts and circumstances in the instant case.

[23] The facts of the instant case is borne by reading facts of the case in exh. P4. P4 showed that the accused was asleep with a woman companion in a room when the police led by Chief Inspector Chandran a/l Sellan together with the other members of the raiding party opened the door to the said room. In the said room the police found one transparent plastic wrapper marked as exh. P10 there was no indication whether the accused was the owner or the tenant of the house. Did the drugs belong to the accused? Neither P4 nor the accused's plea of mitigation made any reference to the owner of the drugs and thus the lurking doubt existed as to the ownership of the drugs.

[24] The offence committed by the accused is serious and the degree of seriousness should be reflected on the sentence imposed. The court nevertheless must strike a balance with regard to the proportion between the offence, the punishment provided by law, the mitigating and aggravating factors and any extenuating circumstances which might exist and to be in favour of the accused. Mitigation is not an entitlement of the accused and will not automatically reduce the sentence to be passed. In the instant case there are no aggravating factors for the court to consider and the accused has no record of previous conviction.

[25] There was no doubt that the accused was the 'author of his own misfortune'. If he had not got himself involved in this crime, he would have had an income of RM30 per day which could be used to support his family. The court recognises the element of human weakness and frailty and succumbed to the evil prey to commit the above offence. As a result of the accused being arrested for the offence the family institution upon which the marriage was built crumbled. The accused's wife deserted him without trace and the three (3) children were placed in an orphanage home. The accused has expressed his remorsefulness and wishes to change his life style and to look after his three (3) children when he completes his prison term. Professor Cross in his

book entitled *'The English Sentencing System'*, 3rd edn, p 141 reminded us that "prolonged and repeated imprisonment is destructive of family relationships and, by encouraging the prisoner's identification with attitudes of the prison community, increases his alienation for normal society. In addition, institutionalization is all too likely to destroy a prisoner's capacity for individual responsibility and increase the problems he must face when he returns to society." All these factors are in the opinion of the court are extenuating circumstances for the court to ponder when considering the appropriate sentence according to law. (See *PP v. Shariffah Syed Hashim* [2006] 6 CLJ 503).

[26] In *PP v. Jafa bin Daud (supra)* at p. 315, His Lordship Mohamed Azmi J (as he then was) said:

> A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must be assessed and passed in accordance with the established judicial principles.

[27] In determining the length of the term of imprisonment to be imposed on the accused, the court had taken into consideration the following factors namely: (i) a plea of guilty was a mitigating factor even if the offender was shown to be a hardened criminal (*PP v. Sulaiman bin Ahmad* [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447); (ii) saved the court precious judicial time (*San Soo Kim v. PP* [1995] 2 MLJ at p 137) and other extenuating circumstances in favour of the accused, (*Liow Siow Long v. PP* [1970] 1 MLJ 40).

[28] The court also considered the views expressed by Mohamed Azmi SCJ in *Mohamad Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 when delivering the judgment of the court.

> It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one third of what otherwise would have been the sentence.

[29] The court is of the view that if the accused had claimed trial to the amended charge, the court would have imposed on the accused a sentence of 12 years imprisonment taking into account the three and half (3 1/2) years the accused was remanded awaiting for the case to be tried.

[30] The court therefore is of the view that taking into account the general principle and the aims and purposes of sentencing and also the mitigating plea by the learned counsel and the submission by the learned deputy prosecutor, the appropriate sentence to be imposed on the accused is seven years imprisonment from the date of arrest and ten strokes of the rattan.